No. 80-602

OCT 14 1980

MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

McDONALD HICKS AND ELI DAVIS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MCDONALD HICKS AND ELI DAVIS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Whether 18 U.S.C. 1153 and 2032, which prohibit a male from having sexual intercourse with a female under age 16 who is not his wife, violates the Due Process Clause of the Fifth Amendment.

TABLE OF AUTHORITIES

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–11a) is reported at 625 F.2d 216. The district court's oral order dismissing the indictment (App. D, *infra*, 20a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 12a) was entered on April 16, 1980. A petition for rehearing was denied on August 15, 1980 (App. C, *infra*, 13a–14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. 1153 provides, in pertinent part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, * * * carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, * * * shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. 2032 provides:

> Whoever, within the special maritime and territorial jurisdcition of the United States, carnally knows any female, not his wife, who has not at-

tained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

STATEMENT

1. On February 15, 1978, a three-count indictment was filed in the United States District Court for the District of Arizona charging respondents with unlawful carnal knowledge of a female under the age of 16, in violation of 18 U.S.C. 1153 and 2032. Counts 1 and 2 of the indictment alleged that on May 4, 1977, respondent Davis had carnal knowledge of a 14-year old and 15-year old female, respectively. Count 3 of the indictment stated that on the same date respondent Hicks had carnal knowledge of the same 15-year old female (App. E, *infra*, 22a-23a). Prior to trial, respondents moved to dismiss the indictment, contending that Sections 1153 and 2032 are unconstitutional. They argued that the statutes impermissibly classify on the basis of gender because a man who has carnal knowledge of an underage female commits a crime, whereas a female who has carnal knowledge of an underage male does not violate Sections 1153 and 2032 (App. D, *infra*, 17a-18a).

On June 19, 1978, the district court granted respondents' motion and dismissed the indictment. The court rejected the government's contention that the gender classification at issue is premised on the physical differences between young men and young women with regard to the act of sexual intercourse, primarily illegitimate teenage pregnancies and physical injuries

(App. D, *infra*, 20a). Citing *Craig* v. *Boren*, 429 U.S. 190 (1976), and *Meloon* v. *Helgemoe*, 564 F.2d 602 (1st Cir. 1977), cert. denied, 436 U.S. 950 (1978), the court stated that "[t]here is nothing in the statute about pregnancy. What they're talking about is carnal knowledge. May or may not have to do with pregnancy" (App. D, *infra*, 20a).

2. On the government's appeal, the court of appeals affirmed. The court first stated that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" (App. A, *infra*, 3a, quoting *Craig* v. *Boren*, *supra*, 429 U.S. at 197). The court acknowledged that the prevention of illegitimate teenage pregnancies and of physical injuries to young females are important governmental interests (App. A, *infra*, 7a–8a). The court concluded, however, that the government failed to demonstrate that these objectives are "'substantially' furthered by punishment only of the male" (*id.* at 8a–9a). Notwithstanding the relative ages of respondents and their victims, the court stated that "on this record the government has not shown that its gender-based assignment of the roles of 'victim' and 'perpetrator' bears a substantial relation to its asserted goals" (*id.* at 11a). Thus, in the court's view, Sections 1153 and 2032 do not "satisf[y] the due process clause of the Fifth Amendment" (*ibid.*).

REASONS FOR GRANTING THE PETITION

This case presents the important question whether the federal carnal knowledge statutes, 18 U.S.C. 1153

and 2032, unconstitutionally discriminate on the basis of gender. A similar question is currently before the Court in *Michael M.* v. *Superior Court of Sonoma County*, cert. granted, No. 79-1344 (June 8, 1980).[1] For the reasons stated in our amicus brief in that case, we believe that the court of appeals has incorrectly held the two Acts of Congress unconstitutional.[2] Because the issue is now pending before the Court, the Court may wish to defer consideration of the petition pending its decision in *Michael M.*

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[1] *Michael M.* involves the constitutionality of California's statutory rape provision. Section 261.5 of the California Penal Code (West 1970) prohibits a male from having sexual intercourse with a female not his wife who is under the age of 18. The federal statutes at issue in this case concern sexual intercourse with females under the age of 16. We further note that the defendant in *Michael M.* was less than 18 at the time of the offense. Thus, *Michael M.* raises an additional question regarding the constitutionality of a statutory rape provision as applied to an underage perpetrator. Respondents, who were 21 and 28 years old respectively at the time of the alleged offense, do not pose the additional question involved in *Michael M.* See Brief for the United States as Amicus Curiae, *Michael M.* v. *Superior Court of Sonoma County*, at 7-9, 24-25. Accordingly, a decision in favor of the petitioner in *Michael M.* would not necessarily control this case.

[2] We have served a copy of our brief in *Michael M.* on respondents' counsel. In addition to the authorities cited in our brief, we wish to draw the Court's attention to its recent summary affirmance in *Lamar* v. *State*, 243 Ga. 401, 402, 254 S.E.2d 353, 354-355, appeal dismissed for want of a substantial federal question, 444 U.S. 803 (1979) (forcible rape statute's discrimination on the basis of gender not impermissible).

CONCLUSION

The Court should defer disposition of the petition for a writ of certiorari pending its decision in *Michael M.* v. *Superior Court of Sonoma County.*

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1980

APPENDIX A

United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 78-2534

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

MCDONALD HICKS, ELI DAVIS, JR.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

April 16, 1980

OPINION

Before: WALLACE and TANG, *Circuit Judges*, and WHELAN,* *District Judge*

WALLACE, Circuit Judge:

The government appeals the dismissal of an indictment against Hicks and Davis alleging against Davis two counts and against Hicks one count of carnal knowledge of a female Indian under 16 years of age in

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* Honorable Francis C. Whelan, United States District Judge, Central District of California, sitting by designation.

violation of 18 U.S.C. § 1153 and § 2032.[1] In response to arguments that the statutes' classification on the basis of gender denies equal protection under the law, the district judge dismissed the indictment. We affirm.

I

We first determine the proper standard of scrutiny to be applied in assessing the constitutionality of the statutes in question. The government does not dispute that the statutes classify on the basis of gender. Hicks and Davis argued before the district judge that only males can be perpetrators, and only females victims, of the crime of carnal knowledge. The statutes assign the roles of victim and criminal on the basis of gender. Had Hicks and Davis been female, they would not

[1] 18 U.S.C. § 1153 states in part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . carnal knowledge of any female, not his wife, who has not attained the age of sixteen years . . . within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 2032 states in part:

> Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

The indictment charged Hicks and Davis under both statutes. Though we must necessarily decide the constitutionality of each, we decide only the constitutionality of that portion of § 1153 pertaining to the offense of carnal knowledge. *See* note 10 *infra*.

have been charged,[2] and the statute thus discriminates against males.

Because federal statutes are before us, we examine the constitutionality of the dissimilar treatment they impose pursuant to the Fifth Amendment. "[T]he Due Process Clause of the Fifth Amendment forbids the Federal Government from denying equal protection of the laws." *Vance* v. *Bradley*, 440 U.S. 93, 94 n.1 (1979); *see Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). Accordingly, we employ the standard of equal protection the Supreme Court has developed for the scrutiny of gender classifications.

In *Craig* v. *Boren*, 429 U.S. 190 (1976), the Court considered the constitutionality of Oklahoma statutes prohibiting the sale of 3.2 percent beer to males under 21 and to females under 18. There the Court stated that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. The Court has continued to hold this standard applicable to gender classifications. *E.g.*, *Califano* v. *Westcott*, 443 U.S. 76 (1979); *Caban* v. *Mohammed*, 441 U.S. 380 (1979); *Orr* v. *Orr*, 440 U.S. 268, 279 (1979); *Califano* v. *Webster*, 430 U.S. 313, 316–17 (1977) (per curiam); *accord*, *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1384 (9th Cir. 1979). We must, therefore, apply that standard.

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[2] The government asserts that carnal knowledge of a male by a female would be treated as an assault pursuant to 18 U.S.C. § 113 but does not contend that, absent an assault, females could be criminally liable for such conduct.

II

At the hearing on the motion to dismiss, Hicks and Davis offered expert testimony and exhibits to demonstrate the unconstitutionality of section 2032. The court rejected these offers of proof. The government then argued that the statutes before us have two purposes: the prevention of unwanted pregnancy and the prevention of physical injury to young females.[3] It offered no evidence. The district judge stated that the statutes "[m]ay or may not have to do with pregnancy," and, relying in part on *Craig*, dismissed the indictments. On appeal, the government's central argument is that Hicks and Davis had the burden of going forward in this case and, therefore, that it first fell to them to show that the statutes did not satisfy the *Craig* standard. We disagree.

In *Berkelman* v. *San Francisco Unified School Dist.*, 501 F.2d 1264 (9th Cir. 1974), we relied on *Reed* v. *Reed*, 404 U.S. 71 (1971), and on the plurality and concurring opinions in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), in stating that the standard of review applicable to classifications based on sex "[requires] the government (state or federal) to produce evidence that the challenged classification furthers the central purpose of the classifier." *Id.* at 1269. We invalidated the school district's gender-based admissions standards in part because the district offered "[n]o actual proof that a balance of the sexes furthers the goal of

[3] While there is some question whether the government adequately raised the physical injury argument in the district court, the record clearly shows that the argument was mentioned. Therefore, the issue is properly before us.

better academic education." *Id. Craig*, and a more recent case, *Caban* v. *Mohammed*, *supra*, 441 U.S. 380, demonstrate that our allocation of the burdens of producing evidence and persuasion in *Berkelman* remains applicable to the case before us.

In *Craig*, the Court characterized the State's statistical evidence as demonstrating an "unduly tenuous 'fit' " between the gender classification and the asserted State objective, 429 U.S. at 202 (footnote omitted), and concluded that "the showing offered by the [State] does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving." *Id.* at 204. Because the State's showing had failed, the Court held the statute unconstitutional.

In *Caban* v. *Mohammed*, *supra*, the Court declared unconstitutional a New York law which granted unmarried mothers, but not unmarried fathers, the right to withhold consent to adoption of their children. The Court rejected outright one of the State's asserted reasons—that mothers are emotionally closer to their children than fathers. 441 U.S. at 389. As an alternative justification for the gender-based distinction, the State argued "that the distinction between unwed fathers and unwed mothers is substantially related to the State's interest in promoting the adoption of illegitimate children." *Id.* The Court acknowledged that the "special difficulties attendant upon locating and identifying unwed fathers at birth," *id.* at 392, might tend to frustrate the State interest in promoting adoptions. In *Caban*, however, the father had established a substantial relationship with the child whose adoption

he wished to prevent, and had admitted his paternity. Having concluded that the challenged classification was overbroad and not narrowly tailored to serve the purpose of promoting adoptions, the Court rejected the State's suggested justification, saying: "no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under [the challenged statute] bears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children." *Id.* at 393. *See also id.* at 409 (Stevens, J., dissenting) (majority placed burden of showing the adoption facilitation objective would be furthered "for *all* persons disadvantaged by rule" on state).

Craig and *Caban* demonstrate that once an appropriate party invokes constitutional scrutiny of a statutory gender-classification, the government must shoulder the burdens of producing evidence and proving a constitutionally-sufficient justification.[4] They thus reaffirm our analysis in *Berkelman*.

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[4]The government points out that a party challenging a *de facto* statutory classification, even one affecting a class protected by strict scrutiny, bears the burden of producing evidence that a statute, though facially-neutral, is applied in discriminatory manner. *See Hernandez* v. *Texas*, 347 U.S. 475, 480 (1954). A fortiori, the government argues, a party challenging a statute containing a facial gender-classification, which receives less than strict scrutiny, must also bear the burden of producing evidence. The government's argument is a non-sequitur. Challengers of facially-neutral laws must point to discriminatory application to establish that a state classifies in a way that triggers constitutional scrutiny. But this step is unnecessary when the challenged classification is, as admitted by the government here, explicitly revealed on the statute's face. The question before us is who bears the burdens of producing

Hicks and Davis triggered constitutional scrutiny in their argument before the district judge by showing that the statutes facially discriminate against males. Each had standing to bring this challenge, because if the statute were unconstitutionally underinclusive, the district court would be required to dismiss the indictment. This provided a sufficient "personal stake in the outcome of the controversy" to afford standing. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 616 (1973) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). *Cf. Orr* v. *Orr*, 440 U.S. 268, 272–73 (1979) (husband had standing when seeking to avoid alimony obligation by challenging divorce statute for gender-based underinclusiveness). When Hicks and Davis produced evidence of facial discrimination on the basis of gender, the burden of showing a substantial relation between important governmental objectives and the gender-based means chosen to effectuate them shifted to the government.

III

It remains for us to determine whether the government met its burdens of producing evidence and proof in this case. We conclude that it did not.

The government has articulated two purposes behind the statutory scheme: prevention of teenage

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evidence and proving a constitutionally sufficient justification once a challenging party has identified a statutory classification which requires some scrutiny. When a challenging party establishes the existence of a *de facto* suspect classification, these burdens of justification lie with the government. *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977). *Caban*, *Craig*, and *Berkleman* illustrate that the same principle applies in challenges to either *de facto* or facial gender-classifications.

pregnancy and prevention of physical injuries to young females.[5] But to demonstrate the relation between these purposes and the statutory penalties, it merely stated that "only women can get pregnant" and that there "seems to be evidence that women are far more likely to suffer physical damage" than are males of the same age. On appeal, the government asks us to take judicial notice of the fact that "intercourse correlates highly with pregnancy." We do. Still, these naked assertions fail to carry even the government's burden of producing evidence in this case, let alone to prove its contentions.

The government's articulated objectives do suggest that Congress had some basis for defining criminal liability for heterosexual contact[6] in terms of the age of the female partner. But the government has produced not a shred of evidence demonstrating how either objective is "substantially" furthered by punishment only

[5] None of the parties has found any legislative history that sheds light on the actual intent underlying the statutes before us. But we need not decide in this case Congress' actual intent in passing these statutes, nor whether such history or other evidence of legislative intent might ultimately be required to satisfy the government's burdens. As did the Court in *Craig*, we first assume the truth of the proclaimed objectives, 429 U.S. at 199 n.7, and inquire whether the government has demonstrated a "substantial relation" between either of these objectives and the gender-based classification. *Id.* In view of our holding on this issue, we need not decide whether the government "simply is selecting a convenient, but false, *post hoc* rationalization," *id.*, nor whether the articulated purposes were, or had to be, "central." *See Berkelman* v. *San Francisco Unified School Dist.*, 501 F.2d 1264, 1269 (9th Cir. 1974).

[6] Though we use "sexual contact" as the equivalent of conduct prohibited by the statutes in question, we do not thereby imply any legal definition of the term "carnal knowledge."

of the male. The absence of such evidence is particularly disturbing because the statute punishes males of any age, even in cases in which the male is younger than the female.[7] The government supplied no evidence that males necessarily always do or should bear greater responsibility for causing sexual contact. No evidence was produced explaining why punishment of males only is more likely to deter teenage pregnancies than punishment of just females, or of both partners. Nor has the government proven why, in sexual contact between females under 16 and males of any age, the female, but not the male, is necessarily always "victimized," or likely to suffer physical injury.

In the absence of any supporting evidence, we cannot accept the government's assertions, which imply the broad generalization that males of all ages are larger, stronger, more sexually aggressive, and less likely to suffer physical injury from sexual contact with females. The government had the burden of showing why gender is a "sufficiently 'accurate proxy,' " *Orr* v. *Orr*, *supra*, 440 U.S. at 280 (quoting *Craig* v. *Boren*, *supra*, 429 U.S. at 204), for prevention of harm arising from contact which inherently requires the participation of both sexes. Particularly when criminal liability rests on the adequacy of the government's justifications, something more than the

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[7] We are thus not asked merely to uphold a legislative judgment to give special protection to only one class of potential victims of exploitation (young females) by older persons, based on the unique harms flowing to that group. Instead, we are asked to uphold a legislative judgment that young females are victims in any case of sexual contact, no matter what the age of the male partner.

government's bare assertions is required. We do not question that the government's assertions might be correct. Other courts have reached differing conclusions about the adequacy of the personal injury and pregnancy prevention rationales.[8] But it was the government's obligation to provide us in this case with evidence supporting its claimed justifications. Here the government, having produced no evidence, would

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[8]The First Circuit overturned a similar New Hampshire statute in *Meloon* v. *Helgemoe*, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978), but upheld a comparable Maine statute in *Rundlett* v. *Oliver*, 607 F.2d 495 (1st Cir. 1979). *Rundlett* is distinguishable from the case before us. In *Rundlett*, the State "offered substantial statistical and medical evidence to support its contention that young females, unlike young males, are often victims of physical injury resulting from a crime that is predominantly committed by males," *id.* at 502 (footnote omitted), and the court concluded that "the gender-based classification [of the statute] is a 'proxy' sufficiently accurate for restricting potentially physically injurious sexual intercourse via its criminal sanction." *Id.* at 503. The court did not reach the question whether the pregnancy prevention rationale would justify the classification. *Id.* at 502. In contrast, here we are without any evidence relating the challenged gender classification to the asserted objectives of the statute.

Although the Fourth Circuit has twice rejected equal protection challenges involving the rape provisions of a West Virginia statute, the first decision, *Hall* v. *McKenzie*, 537 F.2d 1232 (4th Cir. 1976), preceded *Craig*, and the second decision concerned a disparity between punishment for forcible rape of a female and that for carnal knowledge of a male, a question not before us here. *Hall* v. *McKenzie*, 575 F.2d 481, 484-85 (4th Cir. 1978).

State court decisions since *Craig* have sustained statutory rape provisions against claims of sex discrimination. *See e.g*, *Michael M.* v. *Superior Court*, 25 Cal. 3d 608 (1979); *State* v. *Gray*, 112 Ariz. 445, 595 P.2d 990 (1979); *Olson* v. *State*, 588 P.2d 1018 (Nev. 1979); *Hall* v. *State*, 365 So. 2d 1249, 1252-53 (Crim. App. 1978), *cert. denied*, 365 So. 2d 1253 (Ala. 1979); *State* v. *Rundlett*, 391 A.2d 815, 822 (Me. 1978).

have us reject a criminal defendant's constitutional challenge in a factual vacuum. This we cannot do. We conclude, therefore, that on this record the government has not shown that its gender-based assignment of the roles of "victim" and "perpetrator" bears a substantial relation to its asserted goals.[9] Thus, we cannot say that either section 2032 or that portion of section 1153 pertaining to carnal knowledge of a female under 16[10] satisfies the due process clause of the Fifth Amendment. We therefore affirm the dismissal of the indictment.

AFFIRMED.

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[9] Although the government concedes that it failed to suggest one further purpose before the district court, it now asks us to presume that a further goal of Congress in enacting these statutes was the protection of minors from sexual abuse. We need not decide, however, whether such a presumption would be appropriate, for we observe that the assertion of this purpose, assuming it to be valid, would still fail for lack of any evidence in the record of its relation to the gender-based classifications at issue here.

[10] We do not hold all of section 1153 unconstitutional. " 'Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *United States* v. *Jackson*, 390 U.S. 570, 585 (1968) (quoting *Champlin Ref. Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)) (footnote omitted). This case is like *Jackson*, *id.*, at 586, in that the provisions we hold unconstitutional were added after the majority of the listed offenses. *Compare* Act of June 25, 1948, ch. 645, § 1153, 62 Stat. 758, *with* Pub. L. No. 89-707, § 1153, 80 Stat. 1100 (1966).

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIT

Filed
SEPTEMBER 2, 1980

No. 78-2534
DC# Cr 78-56-1/2 WEC

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

MCDONALD HICKS, ELI DAVIS, JR.,
DEFENDANT-APPELLEES.

APPEAL from the United States District Court for the District of ARIZONA (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ARIZONA (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

APPENDIX C

United States Court of Appeals
FOR THE NINTH CIRCUIT

Filed
AUGUST 15, 1980

No. 78-2534

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

McDONALD HICKS, ELI DAVIS, JR.,
DEFENDANTS-APPELLEES.

ORDER

Before: WALLACE and TANG, *Circuit Judges*, and WHELAN,* *District Judge*

The panel as constituted above has voted unanimously to deny the petition for rehearing; Judges Wallace and Tang have voted to reject the suggestion for rehearing en banc, and Judge Whelan has taken no position on the suggestion for rehearing en banc.

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* Honorable Francis C. Whelan, United States District Judge, Central District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

In the United States District Court
FOR THE DISTRICT OF ARIZONA

CR No. 78–56 PHX WEC

JUNE 19, 1978
2:00 P.M. Calendar
Courtroom #1, Federal Building
Phoenix, Arizona 85025

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

McDONALD HICKS AND ELI DAVIS, JR.,
DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Before: Honorable WALTER E. CRAIG, *Judge*
United States District Court, Phoenix Arizona

APPEARANCES:

WILLIAM F. WOODS, *Assistant United States Attorney*
DOUGLAS MC VAY for Defendant Hicks
DAVID OCHOA for Defendant Davis

Reported by:
LLOYD V. WEYENBERG
Official Court Reporter
U.S. District Court
Phoenix, Arizona 85025
253-9640

Phoenix, Arizona
June 19, 1978
2:00 P.M. Calendar

THE CLERK: Case No. CR 78-56, Phoenix,—it's on page 3, Mr. Woods. Mr. McVay has one witness.

United States of America versus McDonald Hicks and Eli Davis, Jr., motion for relief from prejudicial joinder and for hearing Defendants' motion to dismiss.

MR. MC VAY: May I proceed, Your Honor.

MR. WOODS: Your Honor, if I may be heard first a moment. It's my understanding this gentleman is going to give expert testimony as to his opinion on the law. I believe that invades the province of the law we filed, and if he is going to give expert testimony in these motions we haven't filed motions on, I don't believe it should be heard, but as to what the law is, you are the best judge of that.

MR. MC VAY: If the Court please, it is an attack on the statute which my client is being prosecuted under. There is some confusion in the cases on whom the burden falls to demonstrate the existence or non-existence of any compelling State interest to support such a statute or any rational basis for the statute or the third test which is set forth in the case Meloon versus Helgemore, which is attached to our motion. Rather than quibble about what the defense is, the Defendants are prepared to put on testimony of Mr. Gerber, who has expert knowledge in this particular area, having sat on the commission to revise the criminal code and it involves a statute identical to the one here, if the Court wants to give his testimony any credence or not, it's up to the Court whether to quibble whether he should testify.

THE COURT: If you want to hear him, I will ask him. You can argue your points and if I want to hear any evidence from this witness, I will ask for it.

MR. MC VAY: Thank you. May I proceed?

THE COURT: You may step down, thank you.

MR. MC VAY: May I make an offer of proof as to what the testimony of this witness would be?

THE COURT: Go ahead with your argument. I said if I want to hear anything, I will ask for it.

MR. MC VAY: If it please the Court, our complaint or the complaints charge violation of Title 18, U.S.C. 2032. That is the statute that is based upon—it's a gender-based statute that discriminates in our judgment against males. Only a male can violate this particular statute. It is impossible for a woman to be charged under 2032.

There is no question of that fact. What we are claiming is this statute is unconstitutional, discriminates against males and violates the due process clause of the constitution.

The case that we have attached to our motion, Meloon versus Helgemore, which incidentally cert. was just denied on it, the United States Supreme Court specified in order to support a gender-based statute, it is the obligation of the Government to show some important governmental objectives and must be substantially related to achievement of those objectives to justify a statute such as this.

The test and the requirement of supporting a statute as this goes well beyond a rational basis for its distinction although it doesn't seem to come up to the level of

statutes that deal with inherent suspect classifications such as race and religion. This particular type of discrimination seems to fall in between.

It is our position there is no rational basis for the statute, and the distinction and the discrimination that it mentions against males. There is no compelling state interest, governmental interest in this case that we are able to discern, and we are unable to locate or determine any important governmental objective that is furthered by this statute or able to ascertain any substance on how the statute can be substantially related to achievement of any objective.

The purpose of Mr. Gerber's testimony would be to the effect that he has considered an identical question as a member of the criminal investigation of the criminal code, a division of the State, and is unable to ascertain the existence of any rational basis for such a statute, any compelling State interest, or the third test which is set forth in Meloon v. Helgemore.

Finally, I would advise the Court and I am prepared to tender to the Court the fact that the Congress is considering a new criminal code has revised 2032 and eliminates the gender classification discrimination contained in that. Also the State of Arizona, which has adopted a statute that is almost identical to the draft that the Congress is considering with regard to sexual crimes. The gender distinction has been eliminated.

For these reasons, we feel the statute is on its face unconstitutional, and the Indictment on its face should be dismissed.

MR. OCHOA: Your Honor, I don't want to reiterate what Mr. McVay has said. What he has made refer-

ence to I would like to offer as an exhibit attached to our motion is part of that statute, the revision, where you will note that the gender has been eliminated or male and female on the next page. I would also like to offer, Your Honor, it's only a part of the case, it's a very thick book, but it's the Report of the Committee on the Judiciary, United States Senate, which accompanies that particular bill.

And this would be Defendants' Exhibit B. And for the Court's easy reference, I have marked in yellow that portion which cites that that statute that we were talking about—the old statute—is discriminatory on its face.

THE COURT: Tell me, Mr. Ochoa, I notice that proposed Section 1643—

MR. OCHOA: Yes, Your Honor.

THE COURT: —says offense. A person is guilty of an offense if he engages in a sexual act.

MR. OCHOA: I think, Your Honor—

THE COURT: Doesn't that throw the gender right back in it. Says he or something.

MR. OCHOA: I think in most statutes, if you have any construction in any, when they're talking about he they take that in terms not to segregate or make it male or female, but it makes it a person rather than put he or she, it doesn't make sense to use an it.

THE COURT: Why don't they say he or she?

MR. OCHOA: Well—

THE COURT: Or that person. If that person engages in sexual acts with another person.

I think they're in trouble all over again.

MR. OCHOA: That is something maybe somebody ought to make a suggestion to them, but still it doesn't take—

THE COURT: Why don't you make it to them. I'm tired of making suggestions. They don't pay any attention to my suggestions.

Maybe you could get some help.

Okay, thank you.

MR. WOODS: Your Honor, the United States contends there is a rational reason for this classification. Two of these reasons are that the Congress is trying to prevent unwanted pregnancies and only women can get pregnant.

Further, there seems to be evidence that women are far more likely to suffer physical damage from such an attack rather than boys of this age, and we hold that is the rational basis for this classification.

Thank you.

THE COURT: There is nothing in the statute about pregnancy. What they're talking about is carnal knowledge. May or may not have to do with pregnancy.

The motion to dismiss will be granted on the basis of Craig versus Boren, 429 U.S. 190. And Meloon vs. Helgemore, 564 F.2d 602.

MR. OCHOA: Thank you.

CERTIFICATE

I CERTIFY that I took the foregoing matter in machine shorthand and that the same was transcribed under my direction; that the preceding 7 pages of

typewritten matter is a true, accurate and complete accounting of said matter, all done to the best of my skill and ability.

DATED at Phoenix, Arizona, this ___ day of August, 1978.

/s/ _____
LLOYD V. WEYENBERG

APPENDIX E

United States District Court

DISTRICT OF ARIZONA

CR 78-56 PHX

VIO: 18 U.S.C. § 1153 and § 2032
(CIR—Carnal Knowledge of Female Under 16)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

McDONALD HICKS
ELI DAVIS, JR., DEFENDANTS.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

On or about the 4th day of May, 1977, in the District of Arizona, on and within the confines of the Navajo Indian Reservation, Indian Country, ELI DAVIS, JR., an Indian, did carnally know a female Indian named Leta Rose Tsosie, who was not then the wife of ELI DAVIS, JR. and who had not then attained the age of sixteen years, but was of the age of fourteen.

In violation of Title 18, United States Code, Sections 1153 and 2032.

COUNT II

On or about the 4th day of May, 1977, in the District of Arizona, on and within the confines of the Navajo Indian Reservation, Indian Country, ELI DAVIS, JR., an Indian, did carnally know a female Indian named Julia Ann Begay, who was not then the wife of ELI DAVIS, JR. and who had not then attained the age of sixteen years, but was of the age of fifteen.

In violation of Title 18, United States Code, Sections 1153 and 2032.

COUNT III

On or about the 4th day of May, 1977, in the District of Arizona, on and within the confines of the Navajo Indian Reservation, Indian Country, McDONALD HICKS, an Indian, did carnally know a female Indian named Julia Ann Begay, who was not then the wife of McDONALD HICKS and who had not then attained the age of sixteen years, but was of the age of fifteen.

In violation of Title 18, United States Code, Sections 1153 and 2032.

A TRUE BILL

/s/
Foreman of the Grand Jury
February 15, 1978

MICHAEL D. HAWKINS
United States Attorney
District of Arizona

/s/
Assistant U.S. Attorney

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NO. 80-602

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES OF AMERICA

PETITIONER

-vs-

McDONALD HICKS AND ELI DAVIS, JR.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondents, McDonald Hicks and Eli Davis, Jr., pursuant to Rule 53, Supreme Court Rules and Title 18 U.S.C. §3006A(d)(6), respectfully move this Honorable Court for leave to file the attached Brief of Respondents in Opposition without prepayment of costs and to proceed in forma pauperis. Counsel undersigned was appointed by the United States District Court for the District of Arizona to represent the respondents herein for purposes of appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: November 13, 1980.

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NO. 80-602

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES OF AMERICA

PETITIONER

-vs-

McDONALD HICKS AND ELI DAVIS, JR.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

McDONALD HICKS

ELI DAVIS, JR.

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DID THE CIRCUIT COURT ERR IN DECLARING UNCONSTITUTIONAL TITLE 18 U.S.C. §2032 AND THAT PORTION OF TITLE 18 U.S.C. §1153 PERTAINING TO CARNAL KNOWLEDGE OF A FEMALE UNDER THE AGE OF 16 WHEN THE GOVERNMENT FAILED (1) TO IDENTIFY LEGISLATIVE OBJECTIVES OF THE FACIALLY DISCRIMINATORY STATUTES AND (2) TO OFFER ANY EVIDENCE OF A SUBSTANTIAL RELATIONSHIP BETWEEN THE GENDER-BASED CLASSIFICATIONS CONTAINED IN THE STATUTES AND THE POST HOC RATIONALIZATIONS PROCLAIMED BY THE GOVERNMENT? 5

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES OF AMERICA

PETITIONER

-vs-

McDONALD HICKS AND ELI DAVIS, JR.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

The respondents, McDonald Hicks and Eli Davis, Jr., respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 625 F.2d 216 (Appendix A attached hereto).

QUESTION PRESENTED

DID THE CIRCUIT COURT ERR IN DECLARING UNCONSTITUTIONAL TITLE 18 U.S.C. §2032 AND THAT PORTION OF TITLE 18 U.S.C. §1153 PERTAINING TO CARNAL KNOWLEDGE OF A FEMALE UNDER THE AGE OF 16 WHEN THE GOVERNMENT FAILED (1) TO IDENTIFY LEGISLATIVE OBJECTIVES OF THE FACIALLY DISCRIMINATORY STATUTES AND (2) TO OFFER ANY EVIDENCE OF A SUBSTANTIAL RELATIONSHIP BETWEEN THE GENDER-BASED CLASSIFICATIONS CONTAINED IN THE STATUTES AND THE POST HOC RATIONALIZATIONS PROCLAIMED BY THE GOVERNMENT?

STATEMENT OF THE CASE

Title 18 U.S.C. §1153 and §2032 contain an impermissible classification based on gender.

Respondents accept petitioner's statement set forth on pages 2 and 3 of the petition. However, respondents add to that statement the Circuit Court's determination that the government failed to identify any legislative objective underlying the gender-based classifications contained in the challenged statutes. The Circuit Court was willing, for purpose of the appeal, to assume the truth of the objectives proclaimed by the government as this Court did in Craig v. Boren, 429 U.S. 190, 199 (1976). Operating on this assumption the Circuit Court still found that the government produced not a shred of evidence demonstrating how the assumed objectives of the statute were substantially furthered by the gender-based classification.

REASONS WHY THE WRIT SHOULD BE DENIED

It is apparent from a reading of Title 18 U.S.C. §2032 that this statute discriminates on the basis of gender. It punishes males who engage in consensual sexual intercourse with females under the age of 16 but not females who engage in the same conduct with males under the age or 16. It is well settled that statutory gender classifications are subject to hightened scrutiny under the Equal Protection Clause. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, supra. Because a federal statute is involved the dissimilar treatment imposed by this statute must be examined pursuant to the Fifth Amendment. The Due Process Clause of the Fifth Amendment forbids the federal government from denying equal protection of the laws. Vance v. Bradley, 440 U.S. 93, 94, n. 1 (1979). Accordingly, the standard of equal protection which this Court has developed for the scrutiny of gender classifications is controlling.

The standard of review for gender classifications is the "intermediate" or "middle tier" standard first articulated by this Court in Craig v. Boren, supra, at 197:

> "To withstand constitutional challenge ... classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."

Orr v. Orr, 440 U.S. 268, 278 (1979); Califano v. Webster, 430 U.S. 313 (1977). Since Title 18 U.S.C. §2032 is a criminal statute, the correct standard must be applied with "special sensitivity". Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir., 1977), cert. denied, 436 U.S. 590 (1978). Further, since the provisions of the challenged statutes facially discriminate on the basis of gender the burden of showing a substantial relation between important governmental objectives and the gender-based means chosen to effectuate those objectives rests upon the government. Berkelman v. San Francisco Unified School District, 501 F.2d 1264 (9th Cir., 1974); Meloon v. Helgemoe, supra; Navedo v. Preisser, et al., ___ F.2d ___ (8th Cir., #79-1762, 9/22/80).

In the present case the government offered nothing to demonstrate the congressional objectives underlying the enactment of this gender-based statute. The government proffered the prevention of unwanted pregnancies and the prevention of physical injury to young females as possible objectives of this statute. However, there is nothing in the record to support the government's claim that these were the legislative objectives of the Congress when the statute was enacted. Because the government failed to identify the legislative objectives of the challenged statutes this Court is forced to speculate on whether the proffered objectives were in fact the legislature's objectives or simply a convenient but false post hoc rationalization. Craig v. Boren, supra, at 199, n. 7. Under "intermediate" level scrutiny, post hoc rationalizations by reference to objectives other than those which the enacting legislature in fact had in mind is impermissible. See L. Tribe, American Constitutional Law, 1085 (1979).

Assuming for purposes of this appeal, as did the Circuit Court, that the last minute proffered rationalizations of the government were in fact the objectives of the legislature

in enacting these discriminatory statutes, the government has still failed to offer any evidence demonstrating that its claimed objectives are substantially furthered by the gender-based classification. As the Circuit Court stated in its opinion:

> "The government supplied no evidence that males necessarily always do or should bear greater responsibility for causing sexual contact. No evidence was produced explaining why punishment of males only is more likely to deter teenage pregnancies than punishment of just females, or of both partners. Nor has the government proven why, in sexual contact between females under 16 and males of any age, the female, but not the male, is necessarily always 'victimized,' or likely to suffer physical injury.
>
> In the absence of any supporting evidence, we cannot accept the government's assertions, which imply the broad generalization that males of all ages are larger, stronger, more sexually aggressive, and less likely to suffer physical injury from sexual contact than females. The government had the burden of showing why gender is a 'sufficiently "accurate proxy,'" Orr v. Orr, supra, 440 U.S. at 280, 99 S.Ct. at 1112 (quoting Craig v. Boren, supra, 429 U.S. at 204, 97 S.Ct. at 460), for prevention of harm arising from contact which inherently requires the participation of both sexes. Particularly, when criminal liability rests on the adequacy of the government's justifications, something more than the government's bare assertions is required." United States v. Hicks, et al., 625 F.2d 216, 220 (9th Cir., 1980)

United States v. Hicks, et al., supra, conforms to the test and standard of review set forth by this Court in Craig v. Boren, supra, and Caban v. Mohammed, 441 U.S. 380 (1979). As the government failed to identify any legislative objectives of these facially discriminatory statutes and failed to offer any evidence of a substantial relationship between the gender-based classification contained in the statutes and the government's post hoc rationalizations, the Ninth Circuit correctly declared the statutes unconstitutional. In addition, United States v. Hicks, et al., supra, has been followed most recently by the United States Court of Appeals for the Eighth Circuit, Navedo v. Preisser, supra, and is consistent with its precursor, Meloon v. Helgemoe, supra.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court enter an order denying the petition for writ of certiorari. In the alternative, if the petition for a writ of certiorari is granted, it is requested that this Court defer its decision in Michael M. v. The Superior Court of Sonoma County, The People of the State of California, ___ U.S. ___ (No. 79-1344, October Term, 1979) until respondents are afforded an opportunity to brief and argue the issues raised herein. 1/

Respectfully submitted: November 13, 1980

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1/ Oral arguments in Michael M. v. The Superior Court of Sonoma County, supra, were heard by this Court on November 4, 1980.

similar set of facts. There we held that the trial court erred in refusing to consider evidence that "unconditional" personal guaranties were in fact contingent upon execution of similar guaranties by other individuals. The Court remanded the matter to the trial court for a determination as to the existence of such an agreement, the participation or knowledge of the SBA and the possibility that the signing guarantors waived the condition or were estopped to rely on the absence of the other signatures.

Upon remand in this case the district court should consider these points in addition to other questions raised in this litigation concerning damages and the possibility of various set-offs. We hold merely that the district court misapplied the parol evidence rule in refusing to consider appellants' evidence of an unsatisfied condition precedent to the effectiveness of the personal guaranties.

Reversed, including the award to the bank of costs and attorney's fees.

KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff-Appellant,

v.

McDonald HICKS, Eli Davis, Jr., Defendants-Appellees.

No. 78-2534.

United States Court of Appeals, Ninth Circuit.

April 16, 1980.

Rehearing Denied Aug. 15, 1980.

The United States District Court for the District of Arizona, Craig, Senior District Judge, determined that the gender-based classifications of the federal statute proscribing carnal knowledge of a female Indian under 16 years of age and a related statute denied equal protection under the law and dismissed defendants' indictments thereunder, and the Government appealed. The Court of Appeals, Wallace, Circuit Judge, held that gender-based classifications, which articulated two purposes behind statutory scheme of preventing teen-age pregnancy and preventing physical injury to young females, failed to produce evidence demonstrating how either objective was substantially furthered by punishment only of the male.

Affirmed.

1. Constitutional Law ⇐253.2(2)

Due process clause of Fifth Amendment forbids federal Government from denying equal protection of the laws. U.S.C.A.Const. Amend. 5.

2. Constitutional Law ⇐208(3)

To withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. U.S.C.A.Const. Amend. 5.

3. Constitutional Law ⇐208(3)

Once an appropriate party invokes constitutional scrutiny of statutory gender-based classification, government must shoulder burdens of producing evidence and producing a constitutionally sufficient justification; foregoing principle applies to challenges to either de facto or facial gender classifications. U.S.C.A.Const. Amend. 5.

4. Constitutional Law ⇐258(5)
Rape ⇐2

Gender-based classifications of federal statute proscribing carnal knowledge of a female Indian under 16 years of age and statute prohibiting carnal knowledge of a female under age of 16 years within special maritime and territorial jurisdiction of United States denied equal protection under Fifth Amendment; government, which articulated two purposes behind statutory scheme of preventing teen-age pregnancy and preventing physical injury to young females, failed to produce evidence demon-

APPENDIX A

strating how either objective was substantially furthered by punishment only of the male. 18 U.S.C.A. §§ 1153, 2032; U.S.C.A. Const. Amend. 5.

5. Statutes ⇐64(6)

Although court invalidated as unconstitutional section of federal statute proscribing carnal knowledge of a female under 16 years of age within special maritime and territorial jurisdiction of United States, other provisions of that statute remained fully operative. 18 U.S.C.A. § 2032.

Dale Danneman, Asst. U. S. Atty., Phoenix, Ariz., argued, for plaintiff-appellant; William F. Woods, Asst. U. S. Atty., Phoenix, Ariz., on brief.

J. Douglas McVay, Phoenix, Ariz., for defendants-appellees.

OPINION

Appeal from the United States District Court for the District of Arizona.

Before WALLACE and TANG, Circuit Judges, and WHELAN,* District Judge.

WALLACE, Circuit Judge:

The government appeals the dismissal of an indictment against Hicks and Davis alleging against Davis two counts and against Hicks one count of carnal knowledge of a female Indian under 16 years of age in violation of 18 U.S.C. § 1153 and § 2032.[1] In response to arguments that the statutes' classification on the basis of gender denies equal protection under the law, the district judge dismissed the indictment. We affirm.

I

We first determine the proper standard of scrutiny to be applied in assessing the constitutionality of the statutes in question. The government does not dispute that the statutes classify on the basis of gender. Hicks and Davis argued before the district judge that only males can be perpetrators, and only females victims, of the crime of carnal knowledge. The statutes assign the roles of victim and criminal on the basis of gender. Had Hicks and Davis been female, they would not have been charged,[2] and the statute thus discriminates against males.

[1] Because federal statutes are before us, we examine the constitutionality of the dissimilar treatment they impose pursuant to the Fifth Amendment. "[T]he Due Process Clause of the Fifth Amendment forbids the Federal Government from denying equal protection of the laws." *Vance v. Bradley*, 440 U.S. 93, 94 n.1, 99 S.Ct. 939, 942 n.1, 59 L.Ed.2d 171 (1979); *see Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 1228 n.2, 43 L.Ed.2d 514 (1975). Accordingly, we employ the standard of equal protection the Supreme Court has developed for the scrutiny of gender classifications.

* Honorable Francis C. Whelan, United States District Judge, Central District of California, sitting by designation.

1. 18 U.S.C. § 1153 states in part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . carnal knowledge of any female, not his wife, who has not attained the age of sixteen years . . . within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 2032 states in part:

> Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

The indictment charged Hicks and Davis under both statutes. Though we must necessarily decide the constitutionality of each, we decide only the constitutionality of that portion of § 1153 pertaining to the offense of carnal knowledge. *See* note 10 *infra*.

2. The government asserts that carnal knowledge of a male by a female would be treated as an assault pursuant to 18 U.S.C. § 113 but does not contend that, absent an assault, females could be criminally liable for such conduct.

[2] In *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), the Court considered the constitutionality of Oklahoma statutes prohibiting the sale of 3.2 percent beer to males under 21 and to females under 18. There the Court stated that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197, 97 S.Ct. at 457. The Court has continued to hold this standard applicable to gender classifications. *E. g., Califano v. Westcott*, 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979); *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Orr v. Orr*, 440 U.S. 268, 279, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Webster*, 430 U.S. 313, 316–17, 97 S.Ct. 1192, 1194–95, 51 L.Ed.2d 360 (1977) (per curiam); *accord, Blake v. City of Los Angeles*, 595 F.2d 1367, 1384 (9th Cir. 1979). We must, therefore, apply that standard.

II

[3] At the hearing on the motion to dismiss, Hicks and Davis offered expert testimony and exhibits to demonstrate the unconstitutionality of section 2032. The court rejected these offers of proof. The government then argued that the statutes before us have two purposes: the prevention of unwanted pregnancy and the prevention of physical injury to young females.[3] It offered no evidence. The district judge stated that the statutes "[m]ay or may not have to do with pregnancy," and, relying in part on *Craig*, dismissed the indictments. On appeal, the government's central argument is that Hicks and Davis had the burden of going forward in this case and, therefore, that it first fell to them to show that the statutes did not satisfy the *Craig* standard. We disagree.

In *Berkelman v. San Francisco Unified School Dist.*, 501 F.2d 1264 (9th Cir. 1974), we relied on *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), and on the plurality and concurring opinions in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), in stating that the standard of review applicable to classifications based on sex "[requires] the government (state or federal) to produce evidence that the challenged classification furthers the central purpose of the classifier." *Id.* at 1269. We invalidated the school district's gender-based admissions standards in part because the district offered "[n]o actual proof that a balance of the sexes furthers the goal of better academic education." *Id.* *Craig*, and a more recent case, *Caban v. Mohammed*, *supra*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297, demonstrate that our allocation of the burdens of producing evidence and persuasion in *Berkelman* remains applicable to the case before us.

In *Craig*, the Court characterized the State's statistical evidence as demonstrating an "unduly tenuous 'fit'" between the gender classification and the asserted State objective, 429 U.S. at 202, 97 S.Ct. at 459 (footnote omitted), and concluded that "the showing offered by the [State] does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving." *Id.* at 204, 97 S.Ct. at 460. Because the State's showing had failed, the Court held the statute unconstitutional.

In *Caban v. Mohammed*, *supra*, the Court declared unconstitutional a New York law which granted unmarried mothers, but not unmarried fathers, the right to withhold consent to adoption of their children. The Court rejected outright one of the State's asserted reasons—that mothers are emotionally closer to their children than fathers. 441 U.S. at 389, 99 S.Ct. at 1766. As an alternative justification for the gender-based distinction, the State argued "that the distinction between unwed fathers and unwed mothers is substantially related to the State's interest in promoting the adoption of illegitimate children." *Id.* The

3. While there is some question whether the government adequately raised the physical injury argument in the district court, the record clearly shows that the argument was mentioned. Therefore, the issue is properly before us.

Court acknowledged that the "special difficulties attendant upon locating and identifying unwed fathers at birth," *id.* at 392, 99 S.Ct. at 1768, might tend to frustrate the State interest in promoting adoptions. In *Caban*, however, the father had established a substantial relationship with the child whose adoption he wished to prevent, and had admitted his paternity. Having concluded that the challenged classification was overbroad and not narrowly tailored to serve the purpose of promoting adoptions, the Court rejected the State's suggested justification, saying: "no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under [the challenged statute] bears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children." *Id.* at 393, 99 S.Ct. at 1769. *See also id.* at 409, 99 S.Ct. at 1777 (Stevens, J., dissenting) (majority placed burden of showing the adoption facilitation objective would be furthered "for *all* persons disadvantaged by the rule" on state).

Craig and *Caban* demonstrate that once an appropriate party invokes constitutional scrutiny of a statutory gender-classification, the government must shoulder the burdens of producing evidence and proving a constitutionally-sufficient justification.[4] They thus reaffirm our analysis in *Berkelman*.

Hicks and Davis triggered constitutional scrutiny in their argument before the district judge by showing that the statutes facially discriminate against males. Each had standing to bring this challenge, because if the statute were unconstitutionally underinclusive, the district court would be required to dismiss the indictment. This provided a sufficient "personal stake in the outcome of the controversy" to afford standing. *Linda R.S. v. Richard D.*, 410 U.S. 614, 616, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973) (*quoting Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)). *Cf. Orr v. Orr*, 440 U.S. 268, 272–73, 99 S.Ct. 1102, 1108, 59 L.Ed.2d 306 (1979) (husband had standing when seeking to avoid alimony obligation by challenging divorce statute for gender-based underinclusiveness). When Hicks and Davis produced evidence of facial discrimination on the basis of gender, the burden of showing a substantial relation between important governmental objectives and the gender-based means chosen to effectuate them shifted to the government.

III

It remains for us to determine whether the government met its burdens of producing evidence and proof in this case. We conclude that it did not.

[4] The government has articulated two purposes behind the statutory scheme: prevention of teenage pregnancy and prevention of physical injuries to young females.[5]

4. The government points out that a party challenging a *de facto* statutory classification, even one affecting a class protected by strict scrutiny, bears the burden of producing evidence that a statute, though facially-neutral, is applied in discriminatory manner. *See Hernandez v. Texas*, 347 U.S. 475, 480, 74 S.Ct. 667, 671, 98 L.Ed. 866 (1954). A fortiori, the government argues, a party challenging a statute containing a facial gender-classification, which receives less than strict scrutiny, must also bear the burden of producing evidence. The government's argument is a non-sequitur. Challengers of facially-neutral laws must point to discriminatory application to establish that a state classifies in a way that triggers constitutional scrutiny. But this step is unnecessary when the challenged classification is, as admitted by the government here, explicitly revealed on the statute's face. The question before us is who bears the burdens of producing evidence and proving a constitutionally sufficient justification once a challenging party has identified a statutory classification which requires some scrutiny. When a challenging party establishes the existence of a *de facto* suspect classification, these burdens of justification lie with the government. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270 n.21, 97 S.Ct. 555, 566 n.21, 50 L.Ed.2d 450 (1977). *Caban*, *Craig*, and *Berkelman* illustrate that the same principle applies in challenges to either *de facto* or facial gender-classifications.

5. None of the parties has found any legislative history that sheds light on the actual intent underlying the statutes before us. But we need not decide in this case Congress' actual intent in passing these statutes, nor whether such

But to demonstrate the relation between these purposes and the statutory penalties, it merely stated that "only women can get pregnant" and that there "seems to be evidence that women are far more likely to suffer physical damage" than are males of the same age. On appeal, the government asks us to take judicial notice of the fact that "intercourse correlates highly with pregnancy." We do. Still, these naked assertions fail to carry even the government's burden of producing evidence in this case, let alone to prove its contentions.

The government's articulated objectives do suggest that Congress had some basis for defining criminal liability for heterosexual contact[6] in terms of the age of the female partner. But the government has produced not a shred of evidence demonstrating how either objective is "substantially" furthered by punishment only of the male. The absence of such evidence is particularly disturbing because the statute punishes males of any age, even in cases in which the male is younger than the female.[7] The government supplied no evidence that males necessarily always do or should bear greater responsibility for causing sexual contact. No evidence was produced explaining why punishment of males only is more likely to deter teenage pregnancies than punishment of just females, or of both partners. Nor has the government proven why, in sexual contact between females under 16 and males of any age, the female, but not the male, is necessarily always "victimized," or likely to suffer physical injury.

[5] In the absence of any supporting evidence, we cannot accept the government's assertions, which imply the broad generalization that males of all ages are larger, stronger, more sexually aggressive, and less likely to suffer physical injury from sexual contact than females. The government had the burden of showing why gender is a "sufficiently 'accurate proxy,'" *Orr v. Orr*, *supra*, 440 U.S. at 280, 99 S.Ct. at 1112 (*quoting Craig v. Boren*, *supra*, 429 U.S. at 204, 97 S.Ct. at 460), for prevention of harm arising from contact which inherently requires the participation of both sexes. Particularly when criminal liability rests on the adequacy of the government's justifications, something more than the government's bare assertions is required. We do not question that the government's assertions might be correct. Other courts have reached differing conclusions about the adequacy of the personal injury and pregnancy prevention rationales.[8] But it was the government's obliga-

history or other evidence of legislative intent might ultimately be required to satisfy the government's burdens. As did the Court in *Craig*, we first assume the truth of the proclaimed objectives, 429 U.S. at 199 n.7, 97 S.Ct. at 458 n.7, and inquire whether the government has demonstrated a "substantial relation" between either of these objectives and the gender-based classification. *Id.* In view of our holding on this issue, we need not decide whether the government "simply is selecting a convenient, but false, *post hoc* rationalization," *id.*, nor whether the articulated purposes were, or had to be, "central." *See Berkelman v. San Francisco Unified School Dist.*, 501 F.2d 1264, 1269 (9th Cir. 1974).

6. Though we use "sexual contact" as the equivalent of conduct prohibited by the statutes in question, we do not thereby imply any legal definition of the term "carnal knowledge."

7. We are thus not asked merely to uphold a legislative judgment to give special protection to only one class of potential victims of exploitation (young females) by older persons, based on the unique harms flowing to that group. Instead, we are asked to uphold a legislative judgment that young females are victims in any case of sexual contact, no matter what the age of the male partner.

8. The First Circuit overturned a similar New Hampshire statute in *Meloon v. Helgemoe*, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950, 98 S.Ct. 2858, 56 L.Ed.2d 793 (1978), but upheld a comparable Maine statute in *Rundlett v. Oliver*, 607 F.2d 495 (1st Cir. 1979). *Rundlett* is distinguishable from the case before us. In *Rundlett*, the State "offered substantial statistical and medical evidence to support its contention that young females, unlike young males, are often victims of physical injury resulting from a crime that is predominantly committed by males," *id.* at 502 (footnote omitted), and the court concluded that "the gender-based classification [of the statute] is a 'proxy' sufficiently accurate for restricting potentially physically injurious sexual intercourse via its criminal sanction." *Id.* at 503. The court did not reach the question whether the pregnancy prevention rationale would justify the classification. *Id.* at 502. In contrast, here we are

tion to provide us in this case with evidence supporting its claimed justifications. Here the government, having produced no evidence, would have us reject a criminal defendant's constitutional challenge in a factual vacuum. This we cannot do. We conclude, therefore, that on this record the government has not shown that its gender-based assignment of the roles of "victim" and "perpetrator" bears a substantial relation to its asserted goals.[9] Thus, we cannot say that either section 2032 or that portion of section 1153 pertaining to carnal knowledge of a female under 16[10] satisfies the due process clause of the Fifth Amendment. We therefore affirm the dismissal of the indictment.

AFFIRMED.

Felix F. BROWN, Sr., Plaintiff-Appellee,

v.

AMERICAN MAIL LINE, LTD., and American President Lines, Corporations, Defendants,

and

Fireman's Fund Insurance Company, Lien-Claimant-Appellant.

Michael W. RYAN, Plaintiff-Appellee,

v.

EAGLE LINE, INC., MONROVIA, Defendant,

and

Brady-Hamilton Stevedore Company and Fireman's Fund Insurance Company, Intervenors-Appellants.

Harold E. ROGERS, Plaintiff-Appellee,

v.

ORIENT MARINE ASSOCIATES LTD., MONROVIA, Defendant,

...hout any evidence relating the challenged gender classification to the asserted objectives of the statute.

Although the Fourth Circuit has twice rejected equal protection challenges involving the rape provisions of a West Virginia statute, the first decision, *Hall v. McKenzie*, 537 F.2d 1232 (4th Cir. 1976), preceded *Craig*, and the second decision concerned a disparity between punishment for forcible rape of a female and that for carnal knowledge of a male, a question not before us here. *Hall v. McKenzie*, 575 F.2d 481, 484–85 (4th Cir. 1978).

State court decisions since *Craig* have sustained statutory rape provisions against claims of sex discrimination. *See, e. g., Michael M. v. Superior Court*, 25 Cal.3d 608, 159 Cal.Rptr. 340, 601 P.2d 572 (1979); *State v. Gray*, 122 Ariz. 445, 595 P.2d 990 (1979); *Olson v. State*, 588 P.2d 1018 (Nev.1979); *Hall v. State*, 365 So.2d 1249, 1252–53 (Ala.Cr.App.1978), *cert. denied*, 365 So.2d 1253 (Ala.1979); *State v. Rundlett*, 391 A.2d 815, 822 (Me.1978).

utes was the protection of minors from sexual abuse. We need not decide, however, whether such a presumption would be appropriate, for we observe that the assertion of this purpose, assuming it to be valid, would still fail for lack of any evidence in the record of its relation to the gender-based classifications at issue here.

9. Although the government concedes that it failed to suggest one further purpose before the district court, it now asks us to presume that a further goal of Congress in enacting these stat-

10. We do not hold all of section 1153 unconstitutional. " 'Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *United States v. Jackson*, 390 U.S. 570, 585, 88 S.Ct. 1209, 1218, 20 L.Ed.2d 138 (1968) (quoting *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932)) (footnote omitted). This case is like *Jackson*, *id.*, 390 U.S. at 586, 88 S.Ct. at 1218, in that the provisions we hold unconstitutional were added after the majority of the listed offenses. *Compare* Act of June 25, 1948, ch. 645, § 1153, 62 Stat. 758, *with* Pub.L. No.89–707, § 1153, 80 Stat. 1100 (1966).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-602

UNITED STATES OF AMERICA

PETITIONER

-vs-

McDONALD HICKS AND ELI DAVIS, JR.

RESPONDENTS

AFFIDAVIT OF SERVICE

J. DOUGLAS McVAY, being first duly sworn, upon his oath, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, one copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Brief of Respondents in Opposition has this 13th day of November, 1980, been hand delivered to the United States Attorney for the District of Arizona, 4000 Federal Building, Phoenix, Arizona 85025; two copies of the same have been forwarded by Priority Mail to the Solicitor General, Department of Justice, Washington, DC 20530.

J. DOUGLAS McVAY
Attorney for Respondent Hicks

SUBSCRIBED AND SWORN to before me this 13th day of November, 1980, by J. Douglas McVay.

Marcia D. Landrois
Notary Public

My Commission Expires: June 14, 1981.